



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 5, 2012

Traverse City Area Public Schools
Stephen Cousins, Superintendent
412 Webster Street
Traverse City, Michigan 49686

Dear Superintendent Cousins:

The Department of State (Department) received a formal complaint filed against the Traverse City Area Public Schools (TCAPS) by Jason Gillman, alleging that TCAPS violated the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 et seq. The investigation and resolution of these complaints is governed by section 15 of the Act and the corresponding administrative rules, R 169.51 et seq. Copies of the complaint and supporting documentation are enclosed with this letter.

Section 57 of the MCFA prohibits a public body from using public funds or public property to make a contribution or expenditure. MCL 169.257(1). The definition of expenditure includes "a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, . . . the qualification, passage, or defeat of a ballot question." MCL 169.206(1). A knowing violation of section 57 is a misdemeanor offense. MCL 169.257(3).

Mr. Gillman alleges that TCAPS "is asking voters to support the continuation of TCAPS long-term infrastructure improvement plan" by distributing a "taxpayer funded mailer [.]". In support of his complaint, Mr. Gillman provided a newspaper article and a mailer which states "Traverse City Area Public Schools is asking voters to support the continuation of TCAPS' long-term capital infrastructure improvement plan by authorizing a bond proposal on November 6, 2012." The return address on the mailer is "TCAPS, Traverse City Area Public Schools, 412 Webster Street, Traverse City, MI 49686."

The purpose of this letter is to inform you of the Department's examination of these matters and your right to respond to the allegations before the Department proceeds further. It is important to understand that the Department is neither making this complaint nor accepting the allegations as true.

If you wish to file a written response to this complaint, you are required to do so within 15 business days of the date of this letter. Your response may include any written statement or additional documentary evidence you wish to submit. All materials must be sent to the Department of State, Bureau of Elections, Richard H. Austin Building, 1st Floor, 430 West Allegan Street, Lansing, Michigan 48918. If you fail to submit a response, the Department will render a decision based on the evidence furnished by the complainant.

A copy of your reply will be provided to Mr. Gillman, who will have an opportunity to submit a rebuttal statement to the Department. After reviewing all of the statements and materials provided by the parties, the Department will determine whether "there may be reason to believe that a violation of [the MCFA] has occurred [.]” MCL 169.215(10). Note that the Department's enforcement powers include the possibility of entering a conciliation agreement, conducting an administrative hearing, or referring this matter to the Attorney General for enforcement of the criminal penalty provided in section 57(3) of the Act.

If you have any questions concerning this matter, you may contact me at (517) 241-0395.

Sincerely,

A handwritten signature in cursive script, reading "Lori A. Bourbonais".

Lori A. Bourbonais
Bureau of Elections
Michigan Department of State

c: Jason Gillman

Michigan Department of State
Campaign Finance Complaint Form

BUREAU OF ELECTIONS
MICHIGAN DEPT. OF STATE
Reset Form

This complaint form may be used to file a complaint alleging that someone violated the Michigan Campaign Finance Act (the MCFA, 1976 PA 388, as amended; MCL 50169.201 *et seq.*).

Please print or type all information.

I allege that the MCFA was violated as follows:

Section 1. Complainant		
Your Name JASON GILLMAN	Daytime Telephone Number 231-932-9550	
Mailing Address 2748 GARFIELD RD N UNIT 15		
City TRAVERSE CITY	State MI	Zip 49686

Section 2. Alleged Violator		
Name TRAVERSE CITY AREA PUBLIC SCHOOLS		
Mailing Address 412 WEBSTER ST.		
City TRAVERSE CITY MI	State MI	Zip 49686

Section 3. Alleged Violations (Use additional sheet if more space is needed.)

Section(s) of the MCFA violated:

SECTION 57

Explain how those sections were violated:

VIOLATOR URGES APPROVAL — "TRAVERSE AREA PUBLIC SCHOOLS IS ASKING VOTERS TO SUPPORT THE CONTINUATION of TCAPS LONG-TERM INFRASTRUCTURE IMPROVEMENT PLAN BY AUTHORIZING A BOND PROPOSAL --- " WITH TAXPAYER FUNDS

Evidence that supports those allegations (attach copies of pertinent documents and other information):

BROCHURE (MAILER) ENCLOSED (COPY) MAILER ON pg 2

EVEN THE LOCAL PAPER (ENCLOSED ALSO) RECOGNIZES THE INFRACTION.

Section 4. Certification (Required)

I certify that to the best of my knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, each factual contention of this complaint is supported by evidence.

X


Signature of Complainant

10/24/12

Date

Section 5. Certification without Evidence (Supplemental to Section 4)

Section 15(6) of the MCFA (MCL 169.215) requires that the signed certification found in section 4 of this form be included in every complaint. However, if, after a reasonable inquiry under the circumstances, you are unable to certify that certain factual contentions are supported by evidence, you may also make the following certification:

I certify that to the best of my knowledge, information, or belief, there are grounds to conclude that the following specifically identified factual contentions are likely to be supported by evidence after a reasonable opportunity for further inquiry. Those specific contentions are:

X

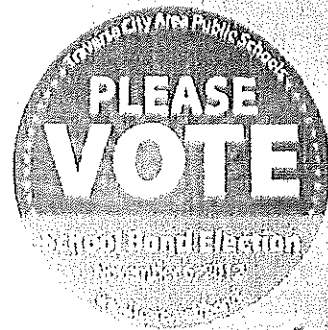
Signature of Complainant

Date

Section 15(8) of the MCFA provides that a person who files a complaint with a false certification is responsible for a civil violation of the MCFA. The person may be required to pay a civil fine of up to \$1,000.00 and some or all of the expenses incurred by the Michigan Department of State and the alleged violator as a direct result of the filing of the complaint.

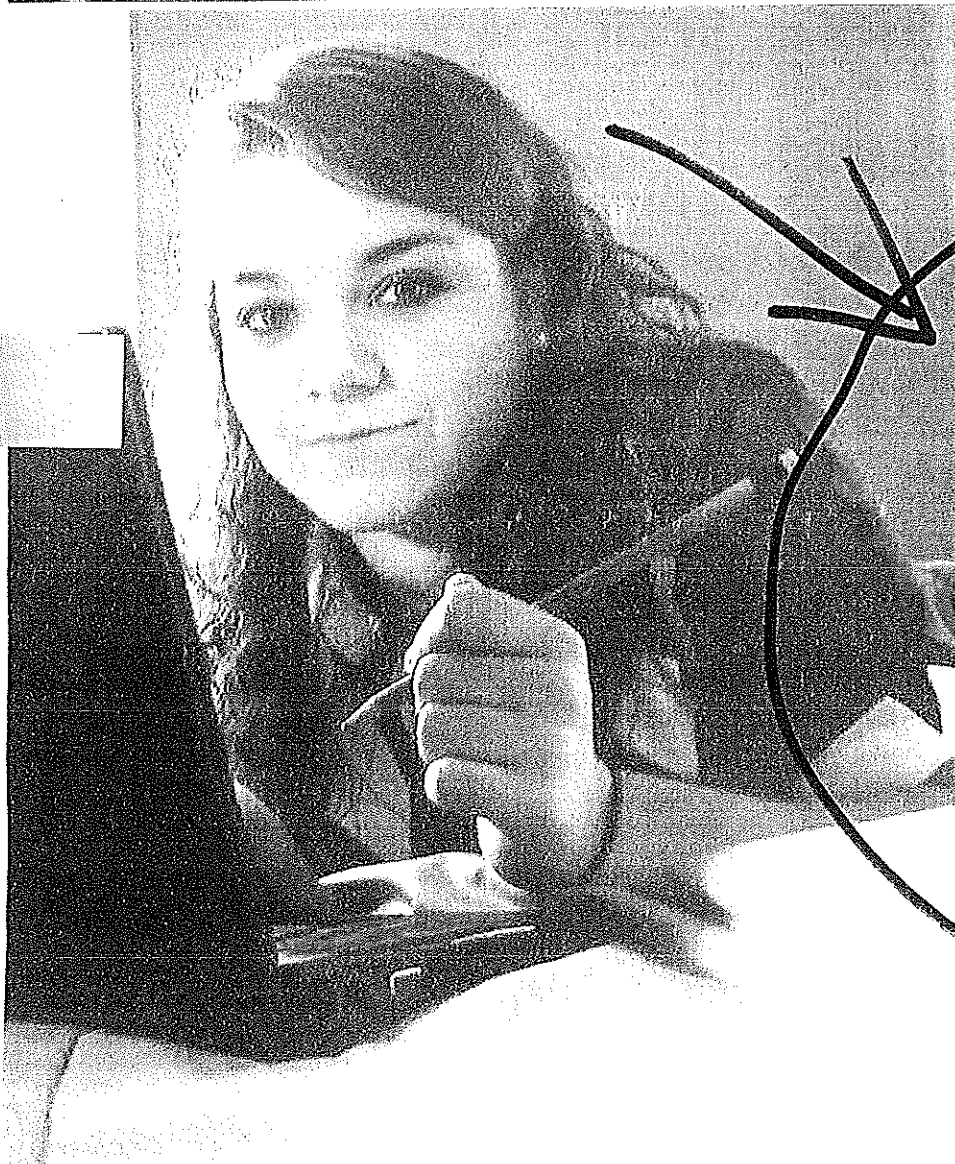
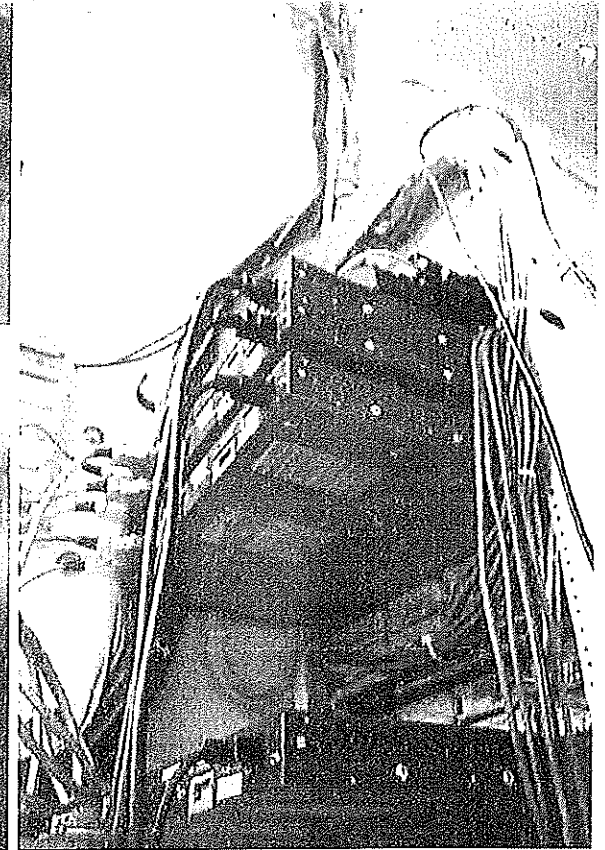
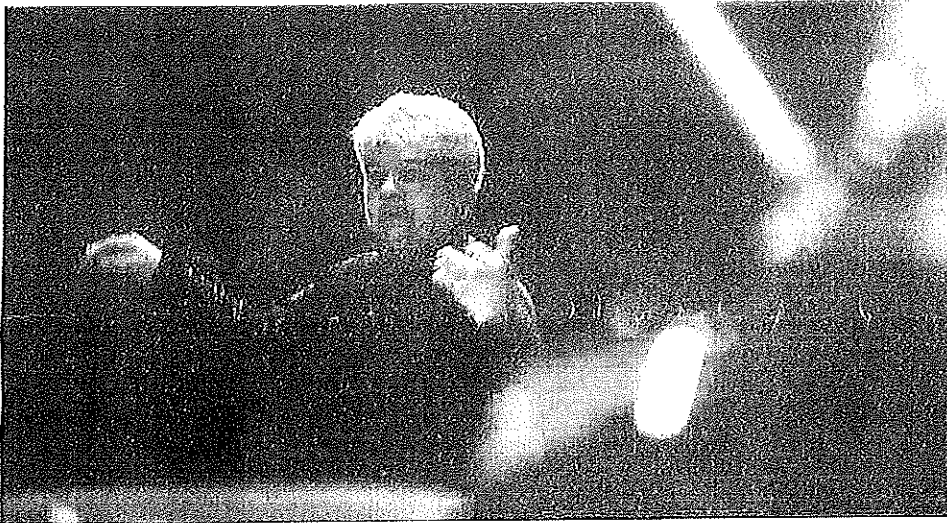
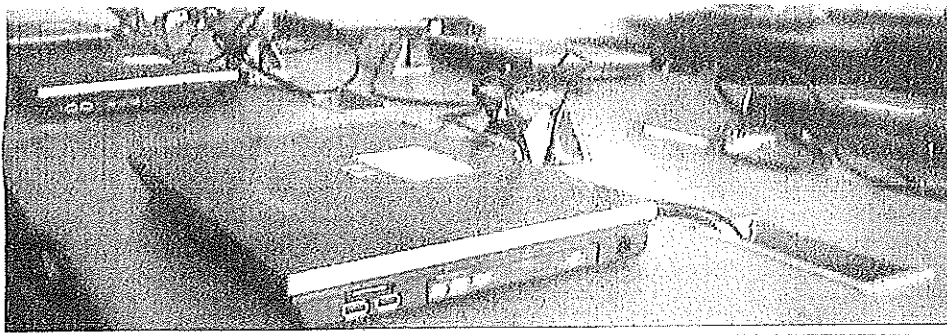
Mail or deliver the completed complaint form and evidence to the following address:

Michigan Department of State
Bureau of Elections
Richard H. Austin Building – 1st Floor
430 West Allegan Street
Lansing, Michigan 48918



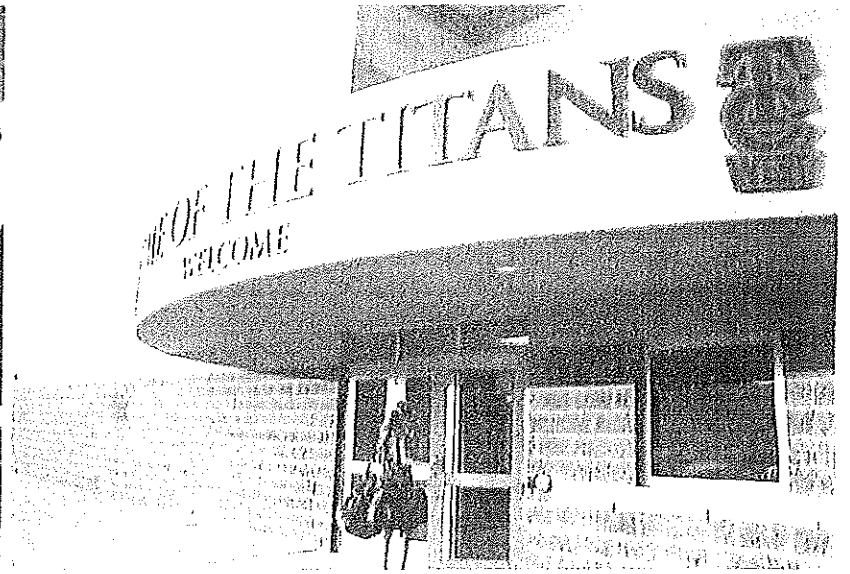
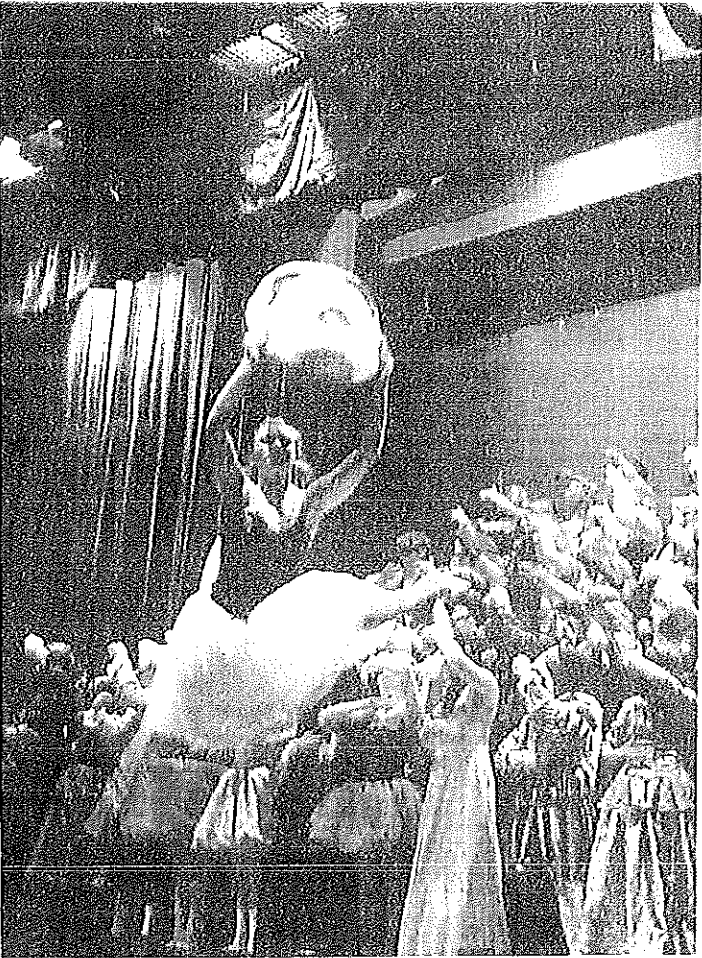
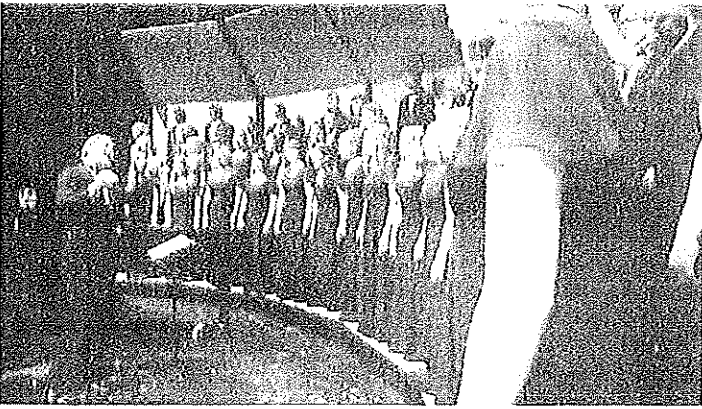
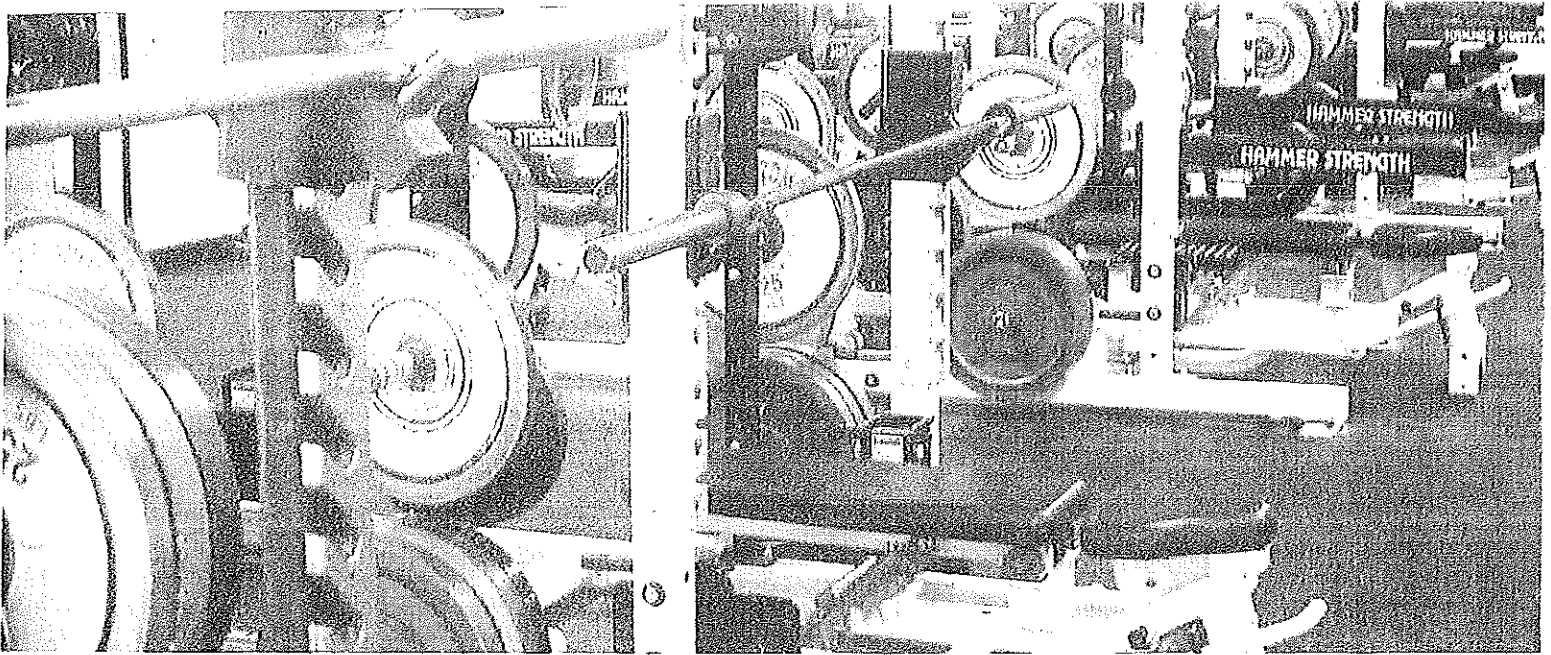
**A FEW WORDS ABOUT OUR
COMMUNITY SCHOOLS.**

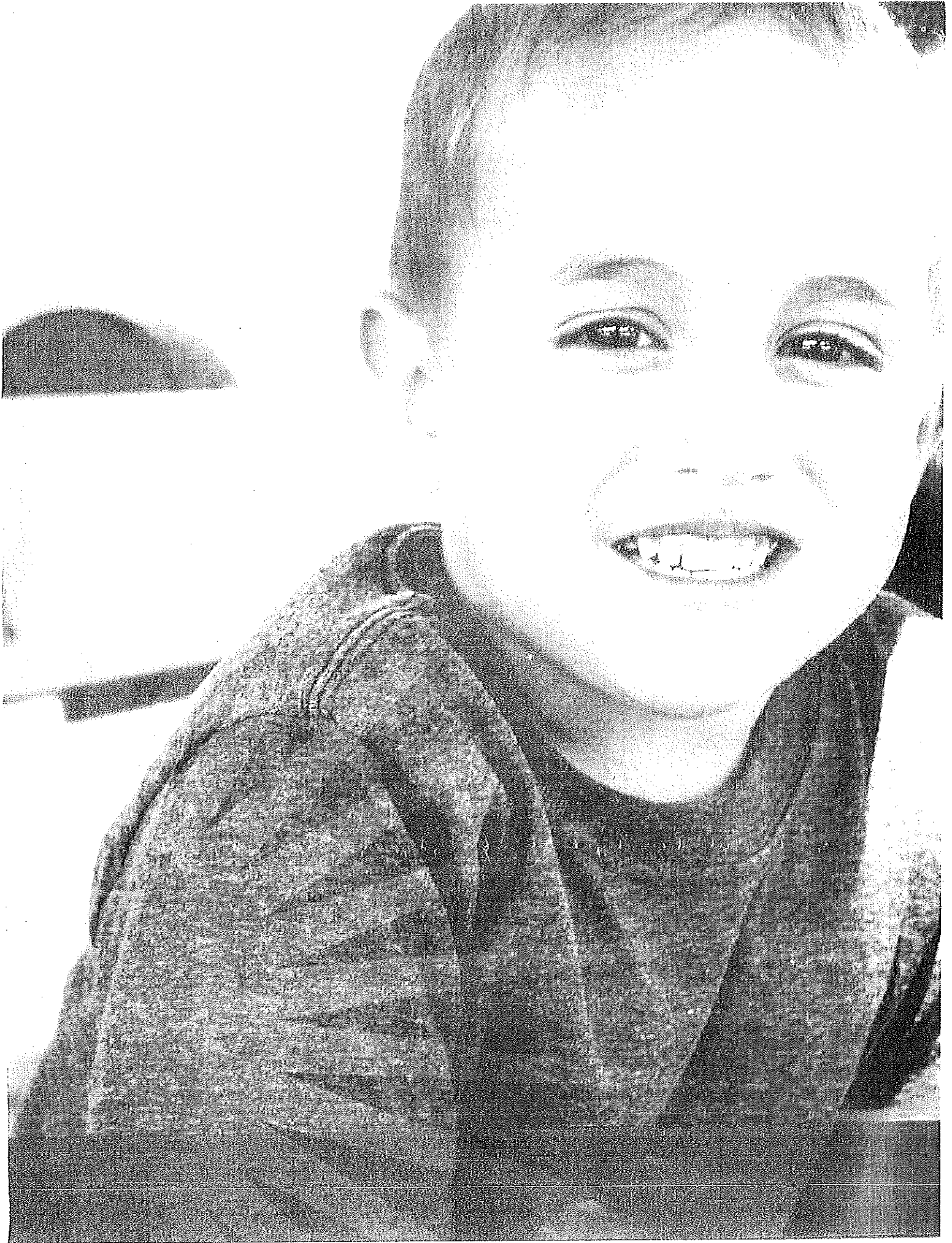
TCAPS
Traverse City Area Public Schools
www.tcaps.net



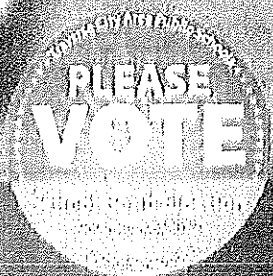
Traverse City Area Public Schools is asking voters to support the continuation of TCAPS' long-term capital infrastructure improvement plan by authorizing a bond proposal on November 6, 2012.

For details and a complete list of proposed and currently authorized capital projects, visit:
www.tcaps.net/bond





NOW IT'S TIME YOU HAVE A SAY.



RENEW YOUR COMMITMENT TO OUR STUDENTS.

All children deserve a quality education. An education supported with leading-edge technology and first-rate resources. An education that opens doors to a variety of opportunities, allowing students to compete and succeed on a worldwide level. Our community has always supported the efforts of Traverse City Area Public Schools (TCAPS) to provide students with quality tools and learning environments.

On November 6th, you'll be asked to renew this commitment to our community's students by authorizing a bond proposal that will fund capital infrastructure improvements over the next ten years.

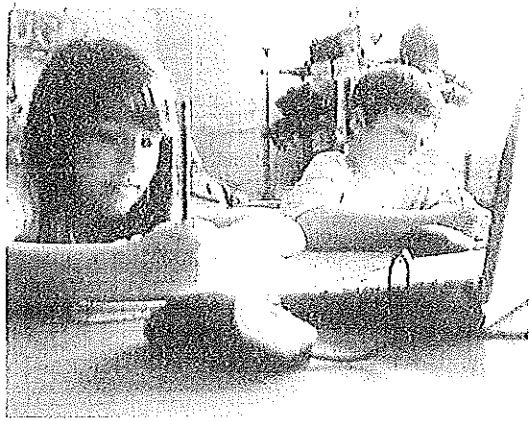
Here are some things you'll want to consider regarding the upcoming bond proposal.

- 1) This bond proposal continues TCAPS long-term capital plan and is consistent with our community approved strategic plan.

Our community has continually supported our efforts to provide students with the best tools and opportunities possible. We have a large school system – serving over 10,000 students, over 25 buildings, 100+ buses, and maintaining over 2 million square feet of infrastructure. To remain fiscally responsible, and keep our local millage rate as low as possible, TCAPS must phase in changes over several years, rather than make system-wide improvements all at once.

This bond continues the work we began under our community approved strategic plan. In 2001, 2004 and 2007, we made improvements to several of our elementary schools. Now it's time for other schools to receive similar attention. *By following our long-term plan, all students at all schools will have quality learning opportunities.*





- 2) This bond proposal ensures the availability of over \$3.5 million dollars per year in general fund money to be directed to support student learning in the classroom.

This bond proposal will allocate funds for infrastructure and technology improvements, buses, maintenance upgrades and replacement costs. Without bond funds to keep up with these capital demands, TCAPS would have to expend operating funds intended for supporting student learning in the classroom.

- 3) Bond monies stay right here in our community.

This bond proposal not only benefits our students, it benefits our entire community.

Almost 90% of bond monies are reinvested in our community. As local construction and trade workers are hired to complete these projects, local jobs, working families and the economic well-being of our community continues to be supported. Supporting our students, supports our community.

- 4) Over the next 10 years, funds generated through voter-authorized bond sales will support the following capital needs:

- Upgrade and reconstruct elementary and secondary school facilities that need immediate attention
- Continue to increase access to technology for all students
- Preserve current transportation services to maintain safety standards and maximize the efficiency of TCAPS fleet of over 100 buses
- Replace operational equipment to properly maintain facilities and to meet curricular needs for physical education and visual and performing arts

[Note: By law, bond monies generated cannot be used for employee salaries or benefits.]

- 5) The proposed millage rate is 23% lower than the state average.

The proposed millage rate to authorize the bonds will be 3.9 mils, an increase from 3.1 mils, which is still 23% lower than the average capital millage rate for K-12 public schools in Michigan. The TCAPS bond proposal will cost the owner of a home with a market value of \$200,000 less than \$80 per year.

TCAPS

Traverse City Area Public Schools
637 Webster Street
Traverse City, MI 49686



*TCAPS is grateful to our community
for supporting quality learning
opportunities that prepare our
children for the future.*

*Now it's time to continue with
needed capital improvements,
so that all students at all schools
will have quality tools and
learning environments.*

For more information about the
November 6th School Bond Election:
We invite you to visit:
www.tcaps.net/bond
Contact TCAPS directly at:
info@tcaps.net
231-933-8995



FIRST-CLASS MAIL
PRESORTED
U.S. POSTAGE PAID
TRAVERSE CITY, MI
PERMIT NO. 133

2004
7016
61

Traverse City Record-Eagle

October 21, 2012

Editorial: District mailer crossed line

---- — Traverse City Area Public Schools officials have some explaining to do.

A mailer recently sent out to voters about the district's \$100 million bond request on the Nov. 6 ballot appears to have crossed the line by urging voters to "support the continuation of TCAPS' long-term capital improvement plan by authorizing a bond proposal on Nov. 6, 2012.

Other district materials contain similar language.

The last we looked state law was clear that election-related material paid for with public money has to be strictly informational and not advocate a position. The fact that the district put the issue on the ballot is a form of advocacy, of course, but supporting materials cannot "ask" or "urge" voters to do anything but vote.

The district needs to clear the air on this issue and do it before the election. Who wrote that language and who authorized spending public money to lobby the public?

There are plenty of ways to inform without advocacy, and that's what is expected of the district.

Bourbonais, Lori (MDOS)

From: Bourbonais, Lori (MDOS)
Sent: Thursday, November 08, 2012 12:27 PM
To: 'Robert A. Dietzel'
Subject: RE: Gillman v TCAPS CFA Complaint
Bob,

The Department acknowledges your request for an extension of time to file an answer to the campaign finance complaint filed against the Traverse City Area Public Schools. The Department understands that there are several district administrators currently out of the country. The Department finds that there is good cause to grant an extension pursuant to MCL 169.215(5). Your answer to the complaint is now due, by my calculation, on December 21, 2012 (calculation does not include November 12 or November 23 as business days).

Lori Bourbonais
Bureau of Elections
Michigan Department of State

From: Robert A. Dietzel [mailto:RDietzel@thrunlaw.com]
Sent: Wednesday, November 07, 2012 6:57 PM
To: Bourbonais, Lori (MDOS)
Subject: RE: Gillman v TCAPS CFA Complaint

Lori,

Thank you. I will be representing the Traverse City Area Public Schools in this matter.

As discussed, I am requesting an extension to respond to the complaint. I believe the extension is warranted for two reasons: (1) several district administrators with information relevant to the complaint will be out of the country for the next several days and (2) I have a jury trial at the end of this month which I anticipate will take up a substantial amount of my time. I am therefore requesting a 15 business day extension, which should, by my calculation, make the response due on December 19th. Please confirm if your office is willing to grant the extension.

I look forward to working with you to resolve this matter.

Robert A. Dietzel, Attorney
Thrun Law Firm, P.C.
Phone 517.374.8858 - Fax 517.484.0041
rdietzel@thrunlaw.com – www.thrunlaw.com

P.O. Box 2575
East Lansing, MI 48826
For deliveries only:
2900 West Road, Suite 400
East Lansing, MI 48823

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11/8/2012

error, please immediately notify the sender by reply e-mail and destroy all copies of the original message.

From: Bourbonais, Lori (MDOS) [mailto:bourbonaisl@michigan.gov]
Sent: Wednesday, November 07, 2012 4:04 PM
To: Robert A. Dietzel
Subject: Gillman v TCAPS CFA Complaint

Bob,

I have attached the notice letter and complaint as one pdf.

Lori Bourbonais
Bureau of Elections
Michigan Department of State

11/8/2012



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

December 21, 2012

Jason Gillman
2748 Garfield Road N
Unit 15
Traverse City, Michigan 49686

Dear Mr. Gillman:

The Department of State received a response to the complaint you filed against the Traverse City Area Public Schools, which concerns an alleged violation of the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, MCL 169.201 *et seq.* A copy of the response is provided as an enclosure with this letter.

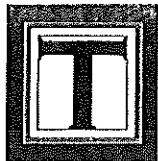
If you elect to file a rebuttal statement, you are required to send it within 10 business days of the date of this letter to the Bureau of Elections, Richard H. Austin Building, 1st Floor, 430 West Allegan Street, Lansing, Michigan 48918.

Sincerely,

A handwritten signature in cursive script that reads "Lori A. Bourbonais".

Lori A. Bourbonais
Bureau of Elections
Michigan Department of State

c: Robert A. Dietzel



THRUN
L A W F I R M, P. C.

U.S. MAIL ADDRESS
P.O. BOX 1575
EAST LANSING, MI 48826-2575
PHONE: (517) 484-8000
FAX: (517) 484-0041
FAX: (517) 484-0081

ALL OTHER SHIPPING
2900 WEST ROAD, SUITE 400
EAST LANSING, MI 48823-1391

ROBERT A. DIETZEL
(517) 374-8858

December 21, 2012

Ms. Lori A. Bourbonais
Michigan Department of State
Bureau of Elections
Richard H. Austin Building - 4th Floor
430 West Allegan Street
Lansing, Michigan 48918

Via hand delivery

2012 DEC 21 PM 2:41

BUREAU OF ELECTIONS
MI DEPT OF STATE

Re: Traverse City Area Public Schools Complaint

Dear Ms. Bourbonais:

I write in response to the complaint filed against the Traverse City Area Public Schools by Jason Gillman (the "Complainant"), who alleges that the District violated the Michigan Campaign Finance Act by using school district resources to encourage voters to vote in favor of a recent school bond proposal. The District received the complaint on November 7, 2012. By e-mail to me dated November 8, 2012, you agreed to extend the District's time to respond to the complaint to December 21, 2012.

The Complainant alleges that the District violated the Campaign Finance Act by publishing and distributing an 8-page informational pamphlet, entitled "A Few Words About Our Community Schools," that contains the following language:

Traverse City Area Public Schools is asking voters to support the continuation of TCAPS' long-term capital infrastructure improvement plan by authorizing a bond proposal on November 6, 2012.

For details and a complete list of proposed and currently authorized capital projects, visit: www.tcaps.net/bond.

The Complainant believes that the District was prohibited by the Campaign Finance Act from expending public resources on a pamphlet that includes the above-quoted language. For the reasons that follow, we do not believe that the District's pamphlet violates the Campaign Finance Act.

Background

More than ten years ago, the Traverse City Area Public Schools' Board of Education and administration, in collaboration with its citizens, developed a long-term strategic plan, which identified needed capital improvement projects. The Traverse City community supported the long-

Ms. Lori A. Bourbonais
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December 21, 2012

term strategic plan by approving bond issues in 2001, 2004, and 2007. Consistent with its long-term strategic plan, the District placed another bond proposal on the November 6, 2012 ballot.

Before the election, school officials published and distributed a pamphlet entitled "A Few Words About Our Community Schools," a copy of which is attached as Attachment A. The pamphlet explains the District's long-term strategic plan, including the capital improvements that would be made if the bond passed.¹ After the pamphlet was distributed to some community members, the Traverse City Record Eagle, Traverse City's local newspaper, published an article in which it quoted Complainant, who alleged that the pamphlet violated the Michigan Campaign Finance Act. Although in drafting the pamphlet school officials had no intention to expressly advocate for passage of the bond, they recognized that some members of the community may have interpreted the pamphlet as doing so. The District therefore stopped further production and distribution of the pamphlet and, in coordination with legal counsel, revised the pamphlet to remove the offending language.

An election was held on November 6, 2012 to determine whether to issue a new school bond for the District. The voters rejected the bond proposal.

The Law

The Complainant alleges that the District violated section 257 of the Campaign Finance Act. The relevant provisions of that Act state:

- (1) A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a). *This subsection does not apply to any of the following:*
 - (a) The expression of views by an elected or appointed public official who has policy making responsibilities.
 - (b) *The production or dissemination of factual information concerning issues relevant to the function of the public body.*

¹ The pamphlet refers readers to www.tcaps.net/bond, which contains extensive detail about the District's strategic plan and how bond funds would be spent.

Ms. Lori A. Bourbonais

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December 21, 2012

- (c) The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.
 - (d) The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.
 - (e) The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event.
 - (f) An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.
- (2) A person who knowingly violates this section is guilty of a misdemeanor punishable, if the person is an individual, by a fine of not more than \$1,000.00 or imprisonment for not more than 1 year, or both, or if the person is not an individual, by 1 of the following, whichever is greater:
- (a) A fine of not more than \$20,000.00.
 - (b) A fine equal to the amount of the improper contribution or expenditure.

MCL 169.257. [Emphasis added].

Section 6 of the Campaign Finance Act defines an “expenditure” to include anything of ascertainable monetary value “in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage or defeat of a ballot question.” MCL 169.206(1). Section 6(2) excludes from the definition of an expenditure “[a]n expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference.” MCL 169.206(2)(b).

The Michigan Department of State has long recognized that the “clear inference” standard contained in section 206(2)(b) is likely unconstitutionally vague and over broad. Accordingly, in

Ms. Lori A. Bourbonais
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December 21, 2012

interpreting section 6(2), the Department has uniformly applied an “express advocacy” test to determine if communications constitute an “expenditure” prohibited by the Campaign Finance Act. See *Letter to LaBrant* (issued April 20, 2004); *Letter to Murley* (issued October 31, 2005).² That test provides “a clear, objective standard that gives meaning to the ambiguous phrase ‘by clear inference.’” *Id.* In applying the express advocacy test, the Department will “analyze a communication by its four corners to determine whether it can be regulated under the [Campaign Finance Act]. If not, the [D]epartment will not inquire further as to the circumstances behind the creation or production of the communication.” *Letter to LaBrant*. Words of express advocacy include “vote for,” “vote against,” “elect,” “defeat,” etc. See *Letter to LaBrant*, quoting *Buckley v Valeo*, 424 U.S. 1, 44 n. 52 (1976).³

The Michigan Attorney General has consistently opined that a school district may inform voters about facts and issues involved in a ballot proposal but may not use public funds to endorse a particular candidate or position. See OAG, 1993-1994, No 6763, p 45 (August 4, 1993) (“[w]hile school districts may objectively inform voters about facts and issues involved in ballot proposals, school district funds may not be used to endorse a particular candidate or position.”); OAG, 1965-1966, No 4291, p 1 (January 4, 1965); OAG, 1979-1980, No 5597, p 482 (November 28, 1979); OAG, 1987-1988, No 6423, pp 33, 35 (February 24, 1987); OAG, 1991-1992, No 6710, pp 125, 127 (February 13, 1992); OAG, 2005-2006, No 7187, p 81 (February 16, 2006).

The District’s Response to Complainant’s Allegation

When looking at the four corners of the pamphlet, it is apparent that no words of “express advocacy” were used. The pamphlet did not encourage voters to “vote for” or “vote against” the

² The Department has likewise applied the “express advocacy” test to determine if communications constitute a “contribution” under section 4 of the Campaign Finance Act. See *Letter to LaBrant*.

³ In *Letter to Murley*, the Department concluded that sections 54 and 57 of the Campaign Finance Act prohibit identical conduct and thus declined to “apply separate standards to communications that are excluded from the [Campaign Finance Act’s] reach by identical language.” The Department has since recognized that, following the U.S. Supreme Court’s decision in *Citizens United v F.E.C.*, 558 U.S. 310; 130 S. Ct. 876 (2010), section 54 of the Campaign Finance Act, MCL 169.254, which prohibits corporations and labor organizations from making a contribution or expenditure, is an unconstitutional restriction on speech. See *Michigan Chamber of Commerce v Land*, 725 F.Supp.2d 665 (W.D. Mich. 2010) (and the Department of State communications quoted therein). Application of different standards under sections 54 and 57, based on the identity of the speaker, is likely to have an unconstitutionally chilling effect on speech. See *Citizens United*, 130 S. Ct. at 898-99 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. . . . We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”). Accordingly, the District encourages the Department to continue its practice of applying the same standard to section 57 of the Campaign Finance Act as it does to section 54 and to conclude that section 57, as written, is an unconstitutional limitation on public employee speech.



Ms. Lori A. Bourbonais
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bond proposal. Instead, the pamphlet encouraged the community to continue its support of the District's long-term strategic plan, which was developed more than a decade ago. The pamphlet then truthfully stated that the bond proposal was consistent with that long-term strategic plan.⁴ In other words, the pamphlet truthfully advised voters that passage of the bond would provide the funding necessary for the District to continue to implement its long-term strategic plan.

The pamphlet legitimately explained to voters facts relevant to the bond election. It explained the District's long-term strategic plan. It explained that passage of the bond was consistent with the long-term plan and that without the funding provided through the bond's passage, the District would not be able to implement its strategic plan. Not only was the District authorized to expend public funds on creating and distributing the pamphlet, the District's Board of Education and its public officials had an obligation to their constituents to truthfully inform them about the bond as it related to the District's long-term strategic plan, which was developed in collaboration with the community.

The Department has previously considered a complaint with similar facts. In a March 24, 2008 letter to Garth J. Christie from Department of State Administrative Law Examiner Melissa Malerman, the Department responded to a complaint filed against Dr. Curtis Ivery and the Board of Trustees of the Wayne County Community College District (collectively the "WCCCD") related to their communications made during a millage renewal election. See Attachment B. There, the WCCCD published a brochure that contained the following language:

Top 12 Reasons Why We Should Support
Wayne County Community College District

[REASON 1] Renewal will permit the continuation of services to over 65,000 students each semester.

[REASON 2] The WCCCD request is for a millage renewal only, not a tax increase.

Vote Tuesday
November 6

⁴ While Complainant focuses his complaint on page 2 of the pamphlet, page 6 provides additional context. That page states, "This bond proposal continues TCAPs long-term capital plan and is consistent with our community approved strategic plan. . . . This bond continues the work we began under our community approved strategic plan." When read in light of the language on page 6, the language on page 2 clearly articulates the District's desire that the community support its strategic plan.



Ms. Lori A. Bourbonais

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December 21, 2012

YOUR VOTE MATTERS

The Department concluded that this language did not constitute express advocacy. Instead, the Department distinguished between express advocacy for the ballot proposal and encouraging support for the College District, noting, "[I]t is important to recognize that the heading quoted above encourages readers to support the Wayne County Community College District, not the ballot proposal. This distinction is central to the Department's conclusion that Dr. Ivery and the Board did not violate section 57 of the Act." The Department further recognized that "the [Campaign Finance Act] allows a public body to produce or disseminate factual information concerning issues that are relevant to its operations provided that the communication does not expressly advocate the passage or defeat of the ballot proposal."

The pamphlet at issue in this matter contains language nearly identical to the language contained in the WCCCD's brochure. As previously explained, the pamphlet asks the community to continue its support of the District's long-term strategic plan. Like the WCCCD's brochure, which stated factually that the millage renewal would permit the continuation of services to over 65,000 students, the at-issue pamphlet stated factually that bond passage would be consistent with the District's long-term plans.

Spending funds on a communication encouraging support for the District's long-term strategic plan does not constitute express advocacy for the ballot proposal and is thus not a prohibited "expenditure" or "contribution" under section 57 of the Campaign Finance Act. Likewise, stating factually that the bond's passage would fund the District's long-term plans falls squarely within the Act's exception for production or dissemination of factual information concerning issues relevant to the function of the public body. MCL 169.257(1)(b).

The District asks that the Department apply the same rationale it applied to the WCCCD's brochure and conclude that there is no reason to believe that the at-issue pamphlet violated section 57 of the Campaign Finance Act.

The District Did Not *Knowingly* Violate the Campaign Finance Act

Although he did not personally draft the pamphlet, Stephen Cousins, the District's superintendent, approved its contents. Mr. Cousins did not believe at the time he approved it that the pamphlet violated the Campaign Finance Act. See Attachment C.⁵ In an abundance of caution, however, once he read the Record Eagle's article, Mr. Cousins directed school staff to immediately stop distributing the pamphlet, and he consulted legal counsel to review the pamphlet's language.

⁵ Attachment C is an unsigned affidavit from Stephen Cousins. Mr. Cousins has reviewed and approved the affidavit and will provide a signed, notarized copy after the holidays.



Ms. Lori A. Bourbonais
Page 7 of 7
December 21, 2012

Id. Through consultation with counsel, the District revised the language to emphasize that the District was not expressly advocating for passage of the bond proposal. *Id.*

The District and its agents did not violate the Campaign Finance Act. To the extent your Office disagrees, however, any putative violation was not "knowing." School officials operated in good faith to communicate factually about an issue that is relevant to the District, which they are permitted to do under the Campaign Finance Act. When Complainant, through the local newspaper, raised a concern about the content of the District's communications, school officials immediately took steps to clarify any doubts about their intentions.

Conclusion

The District does not believe it committed a violation of the Campaign Finance Act. Any putative violation was not committed "knowingly." Accordingly, the District asks that you dismiss and close this matter. In the meantime, the District remains committed to cooperating fully with your Office and welcomes any further inquiry you may have.

If you have any questions, please contact me.

Very truly yours,

THRUN LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read 'Robert A. Dietzel', with a stylized flourish at the end.

Robert A. Dietzel
rdietzel@thrunlaw.com

RAD:jmw

Enclosures

c: Stephen Cousins
Beverly Bonning

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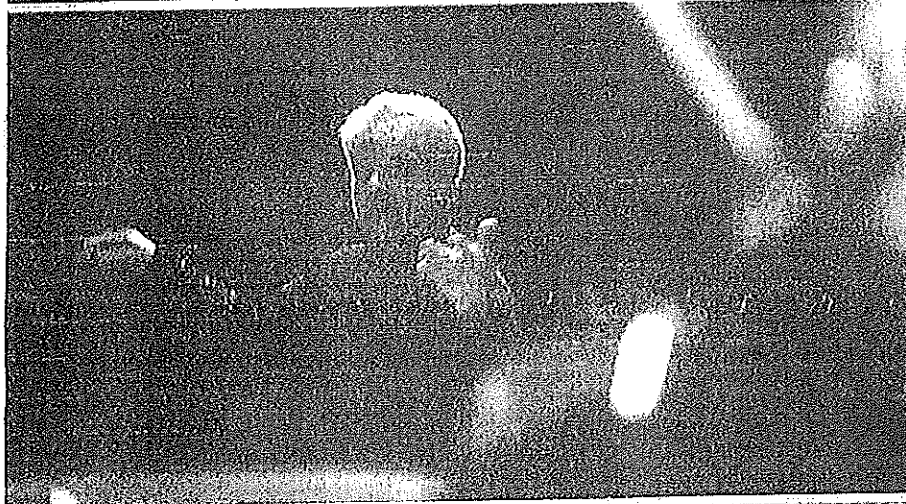
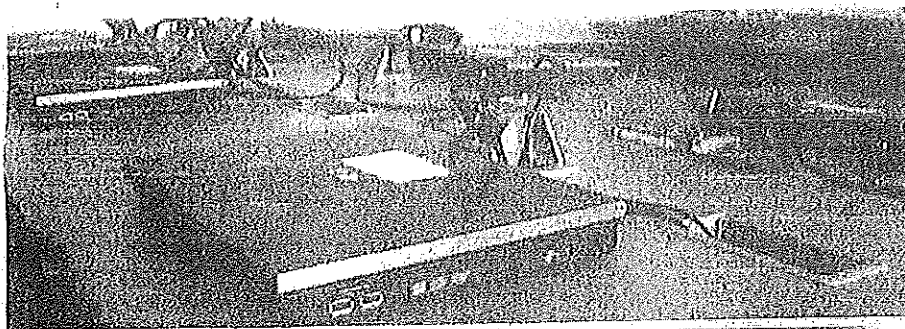
School Bond Election

November 6, 2018

Vote at home

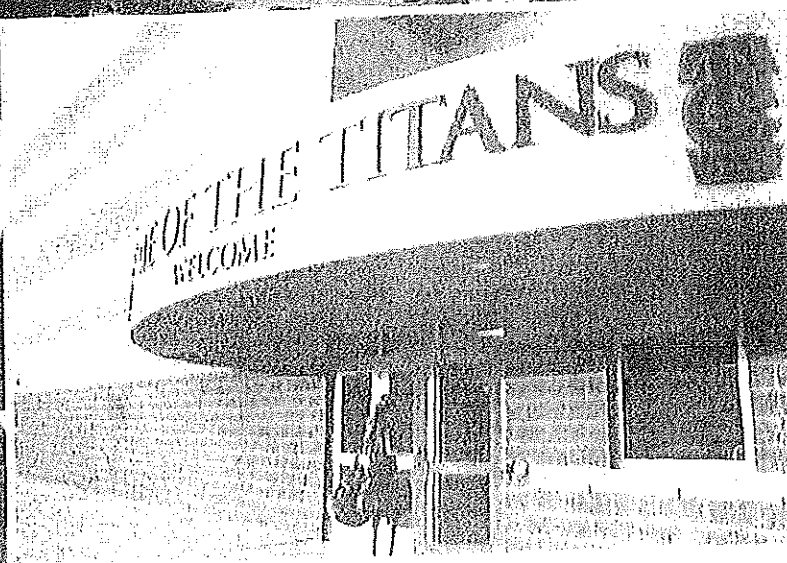
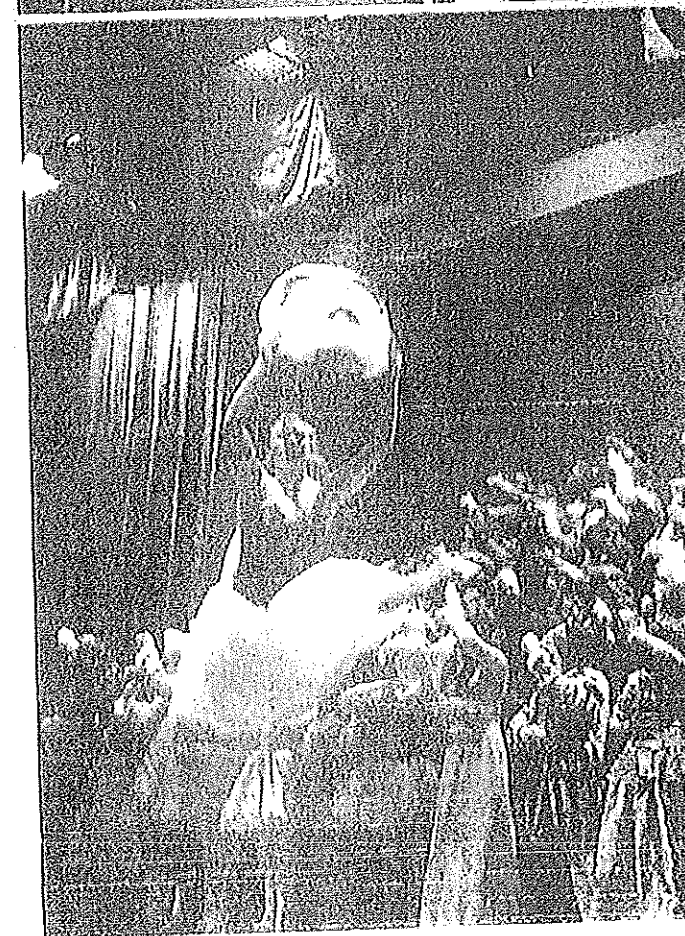
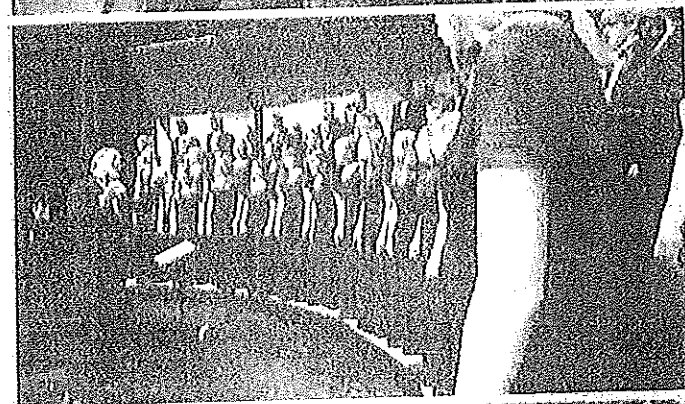
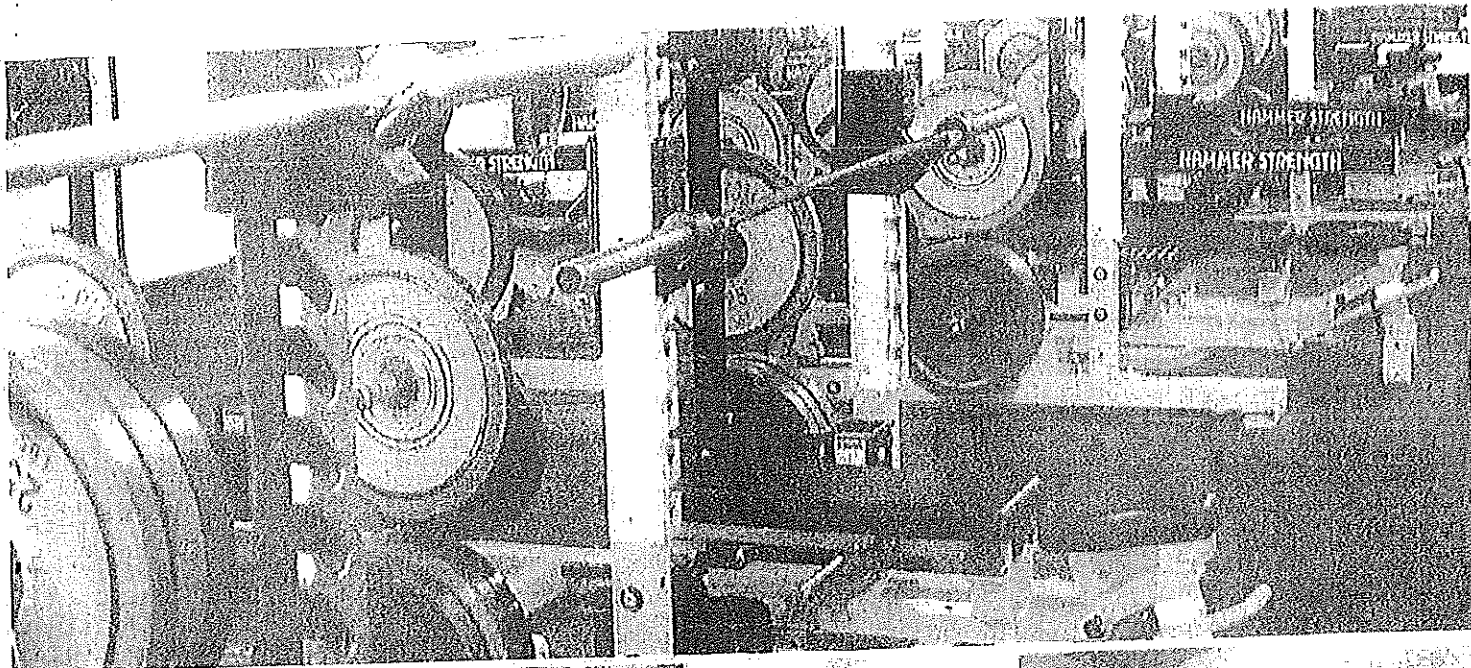
**A FEW WORDS ABOUT OUR
COMMUNITY SCHOOLS.**

TCAPS
Traverse City Area Public Schools
www.tcaps.net



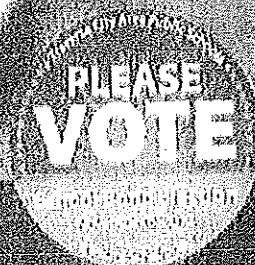
Traverse City Area Public Schools
is asking voters to support the
continuation of TCAPS' long-term
capital infrastructure improvement
plan by authorizing a bond proposal
on November 6, 2012.

For details and a complete list of
proposed and currently authorized
capital projects, visit:
www.tcaps.net/bond





NOW IT'S TIME YOU HAVE A SAY.



RENEW YOUR COMMITMENT TO OUR STUDENTS.

All children deserve a quality education. An education supported with leading-edge technology and first-rate resources. An education that opens doors to a variety of opportunities, allowing students to compete and succeed on a worldwide level. Our community has always supported the efforts of Traverse City Area Public Schools (TCAPS) to provide students with quality tools and learning environments.

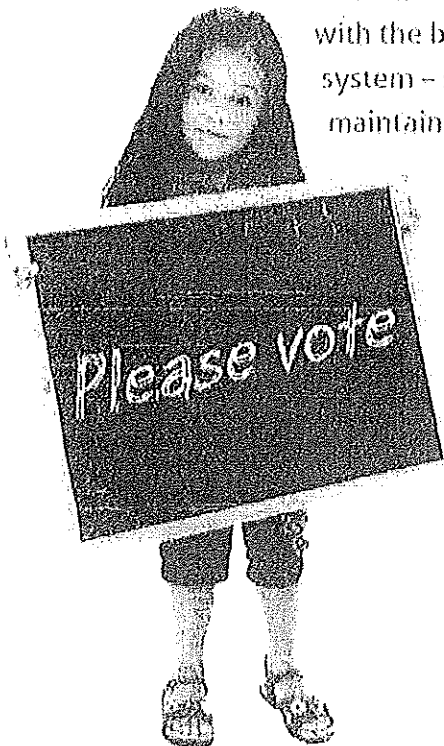
On November 6th, you'll be asked to renew this commitment to our community's students by authorizing a bond proposal that will fund capital infrastructure improvements over the next ten years.

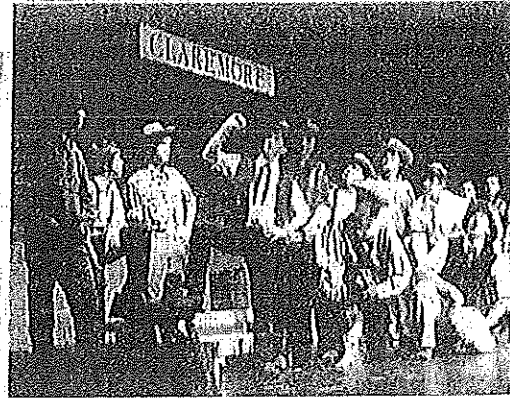
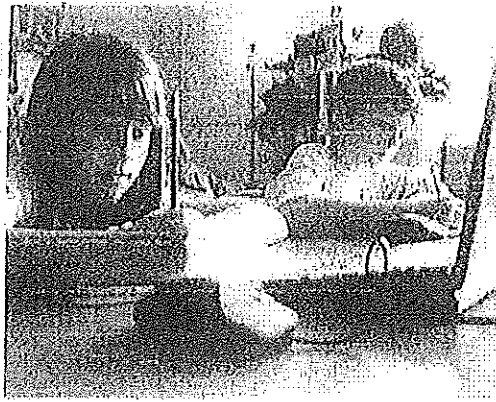
Here are some things you'll want to consider regarding the upcoming bond proposal.

- 1) This bond proposal continues TCAPS long-term capital plan and is consistent with our community approved strategic plan.

Our community has continually supported our efforts to provide students with the best tools and opportunities possible. We have a large school system – serving over 10,000 students, over 25 buildings, 100+ buses, and maintaining over 2 million square feet of infrastructure. To remain fiscally responsible, and keep our local millage rate as low as possible, TCAPS must phase in changes over several years, rather than make system-wide improvements all at once.

This bond continues the work we began under our community approved strategic plan. In 2001, 2004 and 2007, we made improvements to several of our elementary schools. Now it's time for other schools to receive similar attention. *By following our long-term plan, all students at all schools will have quality learning opportunities.*





- 2) This bond proposal ensures the availability of over \$3.5 million dollars per year in general fund money to be directed to support student learning in the classroom.

This bond proposal will allocate funds for infrastructure and technology improvements, buses, maintenance upgrades and replacement costs. Without bond funds to keep up with these capital demands, TCAPS would have to expend operating funds intended for supporting student learning in the classroom.

- 3) Bond monies stay right here in our community.

This bond proposal not only benefits our students, it benefits our entire community.

Almost 90% of bond monies are reinvested in our community. As local construction and trade workers are hired to complete these projects, local jobs, working families and the economic well-being of our community continues to be supported. Supporting our students, supports our community.

- 4) Over the next 10 years, funds generated through voter-authorized bond sales will support the following capital needs:

- Upgrade and reconstruct elementary and secondary school facilities that need immediate attention
- Continue to increase access to technology for all students
- Preserve current transportation services to maintain safety standards and maximize the efficiency of TCAPS fleet of over 100 buses
- Replace operational equipment to properly maintain facilities and to meet curricular needs for physical education and visual and performing arts

[Note: By law, bond monies generated cannot be used for employee salaries or benefits.]

- 5) The proposed millage rate is 23% lower than the state average.

The proposed millage rate to authorize the bonds will be 3.9 mils, an increase from 3.1 mils, which is still 23% lower than the average capital millage rate for K-12 public schools in Michigan. The TCAPS bond proposal will cost the owner of a home with a market value of \$200,000 less than \$80 per year.



TCAPS

Traverse City Area Public Schools
422 Webb Street, SE
Traverse City, MI 49686

*TCAPS is grateful to our community
for supporting quality learning
opportunities that prepare our
children for the future.*

*Now it's time to continue with
needed capital improvements,
so that all students at all schools
will have quality tools and
learning environments.*

For more information about the
November 6th School Bond Election:
We invite you to visit:
www.tcaps.net/bond
Contact TCAPS directly at:
info@tcaps.net
231-933-8995



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STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

March 24, 2008

Mr. Garth J. Christie
15145 Beech Daly Road
Redford, Michigan 48239

Dear Mr. Christie:

The Department of State (Department) has concluded its investigation of your complaint against Dr. Curtis Ivery and the Board of Trustees of the Wayne County Community College District (Board), filed pursuant to the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.* You alleged that Dr. Ivery and the Board violated section 57 of the Act by using or authorizing the use of public resources in support of a recent ballot question regarding the District's proposed millage renewal.

Please note that the MCFA and corresponding administrative rules require the Department to determine whether "there is reason to believe that a violation of this act has occurred." MCL 169.215(10), AC R 169.55(3). The Department has carefully considered all of the written statements and supporting documentation provided by the parties in this matter, and finds that the evidence submitted against Dr. Ivery and the Board does not satisfy this evidentiary standard. Accordingly, the Department has dismissed your complaint for the reasons set forth below.

The MCFA prohibits a public body or an individual acting on its behalf from "us[ing] or authoriz[ing] the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure". MCL 169.257(1). The words "contribution" and "expenditure" are generally defined, in pertinent part, to include anything of ascertainable monetary value that is used to influence or assist a candidate's nomination or election, or the qualification, passage or defeat of a ballot question. MCL 169.204(1), 169.206(1). A knowing violation of section 57 is punishable by the imposition of fines, imprisonment, or both. MCL 169.257(2). It is important to emphasize that the statutory prohibition on utilizing public resources for campaign purposes does not apply to the "production or dissemination of factual information concerning issues relevant to the function of the public body[.]" MCL 169.257(1)(b).

Further, the Department has stated that it "will apply the express advocacy test to communications financed by public bodies." Interpretive Statement to Mr. David Murley, Oct. 31, 2005.¹ Under the 'express advocacy test', the Department reviews campaign literature to

¹ http://www.mi.gov/documents/2005 - Interpretive Statement 142179_7.pdf.

determine whether it constitutes an 'expenditure' and thus, is subject to regulation under the MCFA. The MCFA provides, however, that a communication that "does not support or oppose a ballot question or candidate by name or clear inference [,]" is not an 'expenditure' and is exempt from the requirements and limitations of the MCFA. MCL 169.206(2)(b). In other words, the express advocacy test provides that a campaign advertisement is not subject to regulation under the MCFA unless it specifically urges voters to "vote yes", "vote no", "elect", "defeat", "support" or "oppose" a candidate or ballot question, using these or equivalent words and phrases.

You asserted that Dr. Ivery and the Board used public resources to advocate support for a millage renewal ballot question by mailing to area voters an 8-page brochure entitled, "*Why is the WCCCD millage on the ballot and what does it mean?*" The Department has carefully examined the entire brochure and applying the express advocacy standard described above, has determined that it does not expressly urge readers to vote for or against, support or oppose the ballot proposal.

The Department's analysis begins with the final page of the brochure, which reads in pertinent part:

Top 12 Reasons Why We Should Support
Wayne County Community College District

[REASON 1] Renewal will permit the continuation of services to over 65,000 students each semester.

[REASON 2] The WCCCD request is for a millage renewal only, not a tax increase.

* * *

VOTE Tuesday
November 6
YOUR VOTE MATTERS

It is important to recognize that the heading quoted above encourages readers to support the Wayne County Community College District, not the ballot proposal. This distinction is central to the Department's conclusion that Dr. Ivery and the Board did not violate section 57 of the Act. Furthermore, none of the reasons listed on the final page of the brochure overtly encourage or instruct readers to vote 'yes' on the millage renewal ballot question. "Reason 1" is a factual statement regarding the District's ability to provide services in the future. "Reason 2" clarifies for voters that the question presented to them involves the renewal of an existing millage and not an increase in the millage rate. The brochure closes with a reminder to readers to vote on Election Day but does not explicitly solicit a "yes" or "no" vote.

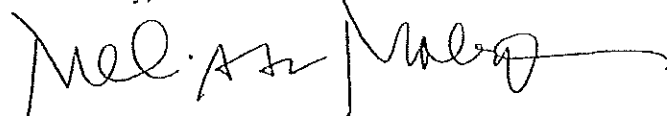
Likewise, the remainder of the brochure is devoid of words of express advocacy. The brochure contains several pages of text relating to the official business of the Wayne County Community College District, including paragraphs pertaining to the District's relative property tax funding compared to other community colleges in Michigan; other funding sources for the college's operations; the college's programs and services, capital improvement projects, enrollment growth, its impact on the local economy; and the like. Taken as a whole, the brochure informs readers that a vote on the millage renewal proposal will occur in November 2007, describes the college's fiscal condition, and discusses the possible consequences of the passage or failure of the ballot question. It plainly does not include such phrases as "vote 'yes' on November 6", "renew the millage now", or "support the ballot question". The various statements of fact are germane to the functioning of the college and consequently are exempt from the Act's prohibition against the use of public resources. MCL 169.257(1)(b).

Although a sensible reader or viewer may be left with the distinct impression that the brochure unequivocally appeals to area residents to vote 'yes' on the millage question, the MCFA allows a public body to produce or disseminate factual information concerning issues that are relevant to its operations provided that the communication does not expressly advocate the passage or defeat of the ballot proposal. MCL 169.257(1)(b), 169.206(2)(b). The Department may only consider the text of the communication itself and not the broader context in which it was made in determining whether it is subject to MCFA regulation. Interpretive Statement to Mr. Robert LaBrant, April 20, 2004.² In rejecting the argument that a person's intent to influence an election should be considered when determining whether a campaign ad contains express advocacy or its functional equivalent under federal law, U.S. Supreme Court Chief Justice Roberts recently wrote that "the proper standard ... must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect[.]" *Federal Election Com'n v Wisconsin Right to Life, Inc.*, 127 S Ct 2652, 2666 (2007).

In conclusion, the Department finds that the available evidence does not establish that "there is reason to believe" that Dr. Ivery and the Board violated section 57 of the MCFA. The Department has dismissed this matter and will take no enforcement action related to your complaint.

Thank you for bringing these allegations to the Department's attention.

Sincerely,



Melissa Malerman, Administrative Law Examiner
Legal and Regulatory Services Administration
Michigan Department of State

MM:kc
c: Mr. Kevin A. Smith

² http://www.mi.gov/documents/2004_126239_7.pdf.

AFFIDAVIT OF STEPHEN COUSINS

AFFIANT, Stephen Cousins, being first duly sworn, deposes and says:

1. I make this Affidavit upon personal knowledge, unless stated to be upon information and belief, and if called as a witness can testify competently to the facts contained herein.
2. I am the Superintendent of Traverse City Area Public Schools (the "District") and have served in that position since 2010. I served as the superintendent during the November 6, 2012 school bond election and the preceding campaign.
3. I have served as a school administrator for 18 years. During that time, I was involved in 5 bond elections.
4. It is my understanding that the Michigan Campaign Finance Act allows school officials to use public resources to inform voters about facts and issues involved in a ballot proposal as long as the information provided is factual and does not expressly advocate for a particular election result.
5. Prior to the November 6, 2012 bond election, the District published a pamphlet entitled "A Few Words About Our Community Schools," which contained factual information about the District and the bond election. The District distributed that pamphlet to some members of the community.
6. While I did not personally draft the pamphlet, I approved its contents.
7. When I approved the pamphlet's content, I did not believe that its publication or distribution could be construed as a violation of the Campaign Finance Act.
8. On or around October 4, 2012, I read an article published in the Traverse City Record Eagle, Traverse City's local newspaper, that raised a concern about the contents of the

pamphlet. The Record Eagle quoted a community member who alleged that the pamphlet violated the Campaign Finance Act.

9. Upon reading the article, I immediately directed staff to cease further production or distribution of the pamphlet. I then consulted legal counsel for assistance in editing the pamphlet to make it clear that the District was not expressly advocating for passage of the bond.
10. During the bond campaign, I purposely endeavored to follow the requirements of the Campaign Finance Act. I likewise communicated to District staff my understanding of those requirements and instructed them to follow the requirements.
11. I do not believe that I violated the Campaign Finance Act. However, if I did, the violation was unintentional.

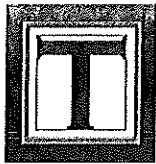
Further affiant sayeth not.

Dated: _____
Stepen Cousins

STATE OF MICHIGAN)
COUNTY OF _____) ss.

Acknowledged before me in _____ County, Michigan, on _____, 2012, by Stepen Cousins.

Notary Public, State of Michigan, County of _____
My commission expires on: _____
Acting in the County of _____



THRUN
L A W F I R M, P. C.

U.S. MAIL ADDRESS
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ROBERT A. DIETZEL
(517) 374-8858

January 7, 2013

Ms. Lori A. Bourbonais
Michigan Department of State
Bureau of Elections
Richard H. Austin Building - 4th Floor
430 West Allegan Street
Lansing, Michigan 48918

Re: Traverse City Area Public Schools Complaint

Dear Ms. Bourbonais:

I stated in my December 21, 2012 letter to you that once I received an original of Traverse City Area Public Schools Superintendent Stephen Cousins's affidavit, I would forward it to you. The signed copy is enclosed.

If you have any questions, please contact me.

Very truly yours,

THRUN LAW FIRM, P.C.

Robert A. Dietzel
rdietzel@thrunlaw.com

RAD:jmw

Enclosure

c: Stephen Cousins - Superintendent of Schools (w/o enclosure)

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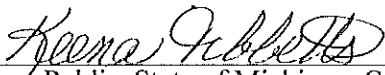
Further affiant sayeth not.

Dated: 12-28-12


Stephen Cousins

STATE OF MICHIGAN)
 GRAND) ss.
COUNTY OF TRAVERSE)

Acknowledged before me in GRAND TRAVERSE County, Michigan, on DECEMBER 28, 2012, by Stephen Cousins.


Notary Public, State of Michigan, County of LEELANAU
My commission expires on: 05-29-2015
Acting in the County of GRAND TRAVERSE

Bourbonais, Lori (MDOS)

From: Bourbonais, Lori (MDOS)
Sent: Monday, January 14, 2013 12:00 PM
To: 'David Bieganowski'
Subject: RE: Extension

Dear Mr. Bieganowski:

The Department acknowledges receipt of your letter regarding the Michigan Campaign Finance Act complaint filed by your client, Jason Gillman, against the Traverse City Area Public Schools. You have requested an extension of time to file a rebuttal statement. Under these unique circumstances, the Department finds good cause for an extension to be granted. Please file the rebuttal statement by January 18, 2013.

Sincerely,

Lori Bourbonais
Bureau of Elections
Michigan Department of State

From: David Bieganowski [mailto:dbiegan@charter.net]
Sent: Monday, January 14, 2013 9:47 AM
To: Bourbonais, Lori (MDOS)
Subject: Extension

Dear Ms. Bourbonais, please find the attached letter.

David A. Bieganowski, Esq., Brewer & Patriot
David A. Bieganowski, PLC
400 E. Eighth Street
P.O. Box 426
Traverse City, Michigan 49685-0426
(231) 947-6073
(231) 947-1645 fax

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1/14/2013

DAVID A. BIEGANOWSKI, PLC

ATTORNEYS AT LAW
400 East Eighth Street, P.O. Box 426
Traverse City, Michigan 49685-0426

2013 JAN 17 11 15 05

Email: dbiegan@charter.net
Telephone: (231) 947-6073
Telefax: (231) 947-1645

David A. Bieganowski

January 14, 2013

Lori A. Bourbonais
Bureau of Elections, MI Dept. of Stat
Richard Austin Bldg., 1st Floor
430 W. Allegan
Lansing, MI 48916

Via Mail and email:
bourbonaisl@michigan.gov

Re: Traverse City Area Public Schools Complaint

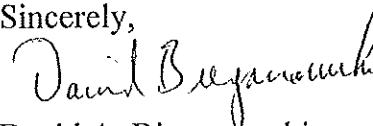
Dear Ms. Bourbonais:

I represent Jason Gillman of Traverse City who filed a complaint against the Traverse City Area Public Schools alleging a Campaign Finance Act violation. Mr. Gillman received a letter from you dated December 21, 2012 stating that if wanted to submit a rebuttal statement it must be sent within 10 days.

That letter from you dated December 21, 2012 is actually postmarked December 27, 2012. See attached. Due to the holidays and what not, he did not see the letter until the 4th of January. We would like to send you a short rebuttal and are asking for an extension until the end of this week, January 18, 2013. I do note that you granted the school's attorney an extension of 6 weeks to respond to the complaint.

Please let me know if this will be acceptable. We plan on sending a short rebuttal soon.

Sincerely,



David A. Bieganowski



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

January 14, 2013

Robert A. Dietzel
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, Michigan 48826-2575

Dear Mr. Dietzel:

This letter concerns the complaint that was recently filed against your client, Traverse City Area Public Schools, by Jason Gillman, which relates to purported violations of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.* The Department of State has received a rebuttal statement from the complainant, a copy of which is enclosed with this letter.

Section 15(10) of the MCFA, MCL 169.215(10), requires the Department to determine within 60 business days from the receipt of the rebuttal statement whether there is a reason to believe that a violation of the Act has occurred. Mr. Gillman's complaint remains under investigation at this time. At the conclusion of the review, all parties will receive written notice of the outcome of the complaint.

Sincerely,

A handwritten signature in cursive script, reading "Lori A. Bourbonais".

Lori A. Bourbonais
Bureau of Elections
Michigan Department of State

c: David A. Bieganowski

Bourbonais, Lori (MDOS)

From: David Bieganowski [dbiegan@charter.net]
Sent: Monday, January 14, 2013 4:05 PM
To: Bourbonais, Lori (MDOS)
Subject: RE: Extension
Attachments: Ltr to Bureau of Elections -TCAPS Gillman 1-14-13.pdf

We didn't need that much time. Our rebuttal is attached.

Thank you

David A. Bieganowski, Esq., Brewer & Patriot

From: Bourbonais, Lori (MDOS) [mailto:bourbonaisl@michigan.gov]
Sent: Monday, January 14, 2013 12:00 PM
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Subject: RE: Extension

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1/14/2013

DAVID A. BIEGANOWSKI, PLC

ATTORNEYS AT LAW

400 East Eighth Street, P.O. Box 426
Traverse City, Michigan 49685-0426

David A. Bieganowski

Email: dbiegan@charter.net

Telephone: (231) 947-6073

Telefax: (231) 947-1645

January 14, 2013

Lori A. Bourbonais
Bureau of Elections, MI Dept. of State
Richard Austin Bldg., 1st Floor
430 W. Allegan
Lansing, MI 48916

Via Mail and email:
bourbonaisl@michigan.gov

2013 JAN 14 PM 4:10

BUREAU OF ELECTIONS
MI DEPT OF STATE

Re: Traverse City Area Public Schools Complaint

Dear Ms. Bourbonais:

Thank you for allowing the extension. This is our rebuttal to the TCAPS response.

We would hope the bureau of election will find the response by TCAPS and superintendent Stephen Cousins to be less than a sufficient excuse for its campaign finance violation. The violation itself is clearly defined as documented in my client's first correspondence with this bureau. The Thrun law firm, in its response indicates it would challenge the overly broad definition of advocacy, yet it had apparently did not have an opportunity to advise the district to change the wording before the fact.

We really don't see how the words used in this case; i.e. "support" and "authorizing" are any different than the words of express advocacy admitted by TCAPS like "vote against," "vote for," and "elect." In fact, the word "support" is cited as a word of express advocacy in the 2008 letter from your department that was attached to the TCAPS response.

Demonstrated by the statement on page 2 (item 9) of the Stephen Cousins affidavit, where it says; "Upon reading the article, I immediately directed staff to cease further production or distribution of the pamphlet. I then consulted legal counsel for assistance in editing the pamphlet to make it clear that the district was not expressly advocating for passage of the bond."

On line 10 of the affidavit, Mr. Cousins makes the claim that he "purposely endeavored" to follow the campaign finance act. If that is the case, one would have expected him to: a.) not only be aware of the rules regarding section 57 of the Michigan Campaign Finance Act with an understanding of 'furthering passage of a ballot question', and, b.) have consulted school legal counsel (Thrun) PRIOR to issuing the print order.

We are aware that the Thrun law firm is very well established and respected within the relevant legal field of practice, and furthermore, the fact is that Thrun served TCAPS'

under retainer for many years and for TCAPS' many prior bonds and millage requests. Apparently, that ended sometime after Mr. Cousins became TCAPS's Superintendent.

Mr. Cousins has essentially said (and does not contradict after further reading) that he did NOT consult with attorneys (Thrun) before issuing a print and send order of the pamphlets. He has now put Thrun in the position of having to argue, on his behalf, for shoddy language that they didn't get a chance to review and edit prior to it being PRINTED AND CIRCULATED. Once he had made the Thrun law firm aware of this complaint, they appropriately advised the changes to bring into an acceptable standard; one that was not met with the initial mailing, with which the existing violation had already occurred.


Stephen Cousins by his own admission has been a school administrator in the state of Michigan for a number of years. It is unlikely he would be unknowing of campaign finance rules that govern such activity with monies in the public trust. Yet as a final defensive posture, claims possible ignorance of the rules.

We continue to stand on the belief that TCAPS carelessly ignored the act, used public moneys in its advocacy, and had only responded with corrective measures once it had been discovered. There are no acceptable exclusions which allow the advocacy to exist under section 57 of the Michigan Campaign Finance Act.

The complainant is not seeking any criminal penalties against Mr. Cousins and TCAPS. We do not assert "intent" to violate the law by them. However, we do request a finding that they did violate the applicable campaign law as set forth in my client's complaint. And we do ask that the taxpayer-funded TCAPS' costs for printing and mailing this brochure be recovered as a penalty assessed against TCAPS. How can public trust be restored in proper governance, unless checks and balances exist to assure proper legal review of all future brochures and ads?

Once again, I thank you for your time and attention on this matter.

Sincerely,


David A. Bieganski



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 18, 2013

Robert A. Dietzel
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, Michigan 48826-2575

Dear Mr. Dietzel:

The Department of State (Department) has completed its initial investigation of the complaint filed against your client, Superintendent Stephen Cousins and Traverse City Area Public Schools (TCAPS) by Jason Gillman, which alleged that TCAPS violated section 57 of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.257. This letter concerns the disposition of Mr. Gillman's complaint.

The MCFA prohibits a public body or an individual acting on its behalf from "us[ing] or authoriz[ing] the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure." MCL 169.257(1). The words "contribution" and "expenditure" are generally defined, in pertinent part, to include anything of ascertainable monetary value that is used to influence or assist a candidate's nomination or election. MCL 169.204(1), 169.206(1). A knowing violation of section 57 is a misdemeanor offense. MCL 169.257(3).

Expenditure is a term of art which includes "a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to . . . the qualification, passage, or defeat of a ballot question [.]". MCL 169.206(1).

The Act also requires the Department to "endeavor to correct the violation or prevent a further violation by using informal methods [.]" if it finds that there may be reason to believe that a violation has occurred, and if the Department is unable to correct or prevent additional violations, it may convene an administrative hearing or ask the Attorney General to prosecute if a crime has been committed. MCL 169.215(10). The objective of an information resolution is "to correct the violation or prevent a further violation [.]" *Id.*

Mr. Gillman filed his complaint on October 30, 2012. You filed an answer on December 21, 2012, and counsel for Mr. Gillman filed a rebuttal statement on January 14, 2013.

Mr. Gillman alleged that TCAPS improperly used public funds to produce a mailer which directed voters to authorize a bond proposal. As evidence, Mr. Gillman provided a copy of a flyer which states "Traverse City Area Public Schools is asking voters to support the continuation of TCAPS' long-term capital infrastructure improvement plan by authorizing a

bond proposal on November 6, 2012 [,]" along with a copy of a *Traverse City Record-Eagle* editorial questioning whether the mailer "crossed the line by urging voters" to authorize the bond proposal.

In response, you stated that no words of express advocacy were used within the four corners of the mailer, that the mailer did not encourage voters to "vote for" or "vote against" the bond proposal, the pamphlet only encouraged the community to continue its support of the district's long-term strategic plan, and that the flyer "legitimately explained to voters facts relevant to the bond election."

You contend that (1) the flyer does not meet the express advocacy standard used by the Department when determining the applicability to the MCFA to a communication; (2) that even if the Act does apply, the exception allowing for "the production or dissemination of factual information concerning issues relevant" to the function of TCAPS contained in MCL 169.257(1)(b) applies; and that (3) the language in the flyer is analogous to language in a written communication regarding a Wayne County Community College District millage renewal that was the subject of a previous complaint which was subsequently dismissed by the Department as not constituting express advocacy.

Finally, you submit that while Superintendent Cousins approved of the language in the flyer, he did not believe at the time of approval that it violated the MCFA, and after reading the concerns in the *Traverse City Record-Eagle*, Superintendent Cousins consulted legal counsel and subsequently "revised the language to emphasize that the District was not expressly advocating for passage of the bond proposal."

The Department applies the "express advocacy test" to communications to determine if they are subject to the Act. *Interpretive Statement to David Murley* (Oct. 31, 2005).¹ The MCFA provides that a communication that "does not support or oppose a ballot question or candidate by name or clear inference" is not subject to the requirements and limitations of the MCFA. MCL 206(2)(b). A communication that expressly supports or opposes a candidate contains words such as "vote for," "vote against," "support," "defeat," or equivalent words or phrases.²

However, the presence or absence of the express words of advocacy listed in *Buckley* does not end the analysis. The words mentioned in *Buckley* do not describe the entire universe of express advocacy, and the inclusion of the phrase "such as" in the Court's description implies that the words were not meant to be a straitjacket. In *Federal Election Commission v Massachusetts Citizens for Life*, 479 US 238 (1986), the Court concluded that a "message marginally less direct than 'Vote for Smith' does not change its essential nature." *Massachusetts Citizens* at 249.

¹ http://www.mi.gov/documents/2005_-_Interpretive_Statement_142179_7.pdf.

² The United States Supreme Court, in *Buckley v Valeo*, 424 US 1 (1976), held that the term "expenditure" included only funds used for "communications that expressly advocate the election or defeat of a clearly identified candidate." The Court explained that express advocacy includes communications that contain "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject [.]'" *Id.* at 44, n 52.

Thus, the Department considers whether a communication contains not only the *Buckley* words, but also equivalent words or phrases.

The flyer stated that TCAPS “is asking voters to support the continuation of TCAPS’ long-term capital infrastructure improvement plan by authorizing a bond proposal on November 6, 2012.” This flyer urged voters to take specific action on November 6, 2012 – namely, to authorize the bond proposal. The only way that a voter could “authorize” the bond proposal would be for the voter to vote yes on the proposal that was on the November 6, 2012 ballot. The flyer expressly advocates the passage of the ballot question, which places it squarely within the MCFA’s prohibition of the use of public resources to make a contribution or expenditure.

When considering a communication funded by a public body, once the Department determines that a communication contains express advocacy and, therefore, falls under the umbrella of the MCFA, we must then determine whether one of the narrow exceptions to section 57 applies. Here, you argue that the flyer was merely dissemination of facts relevant to the functioning of TCAPS and that the exception contained in section 57(1)(b) removes the flyer from the ambit of the MCFA.

Section 57(1) states that the subsection does not apply to:

(b) The production or dissemination of factual information concerning issues relevant to the function of the public body.

MCL 169.257(1)(b). However, while the Michigan Attorney General has stated that “school districts . . . may expend public funds to inform their electors in a fair and object manner of the facts surrounding an upcoming ballot proposal or proposals to be voted upon by the school district . . . electors [.]”³ the Department has stated that the information “may be produced and disseminated using public resources, as long as the information is limited to facts and does not include express advocacy.”⁴ The Department finds that this exception does not apply to the flyer in question, because the flyer does, indeed, include express advocacy.

Finally, the Department does not agree that the flyer is analogous to the communication that was the subject of a previous complaint regarding a Wayne County Community College District (WCCCD) millage renewal. You contend that the language contained in the TCAPS flyer is “nearly identical to the language contained in the WCCCD’s brochure.” The WCCCD brochure contained the following language:

Top 12 Reasons Why We Should Support
Wayne County Community College District

[REASON 1] Renewal will permit the continuation of services to over 65,000 students each semester.

³ OAG, No 6531, 1987-1988 (August 8, 1988).

⁴ *Murley* Interpretive Statement at 5.

[REASON 2] The WCCCD request is for a millage renewal only, not a tax increase.

* * *

VOTE Tuesday
November 6
YOUR VOTE MATTERS

In a letter to the complainant in that matter, the Department explained that:

[T]he heading quoted above encourages readers to support the Wayne County Community College District, not the ballot proposal. This distinction is central to the Department's conclusion that Dr. Ivery and the Board did not violate section 57 of the Act. Furthermore, none of the reasons listed on the final page of the brochure overtly encourage or instruct readers to vote "yes" on the millage renewal ballot questions.⁵

The WCCCD communication is distinguishable from the TCAPS flyer. Unlike the WCCCD publication, the TCAPS flyer overtly instructs the reader to take specific action – namely to “authoriz[e] the bond proposal on November 6, 2012.” While the flyer makes it clear that the reason this action should be taken is to support “the continuation of TCAPS’ long-term capital infrastructure improvement plan [.]” TCAPS takes the extra step to instruct the reader to do this by supporting the ballot question on the November 6, 2012 general election ballot.

Because the Department finds that the flyer contains express advocacy, the Department believes that the evidence supports its conclusion that there may be a reason to believe that a violation of section 57 of the Act has occurred. Upon making this determination the Department is required by law to attempt to resolve the matter informally. MCL 169.215(10).

By May 6, 2013, please provide the Department with the number of flyers that were printed, the amount of time taken to draft, proof, and distribute the flyers, the number of staff members utilized in its production, and the cost of mailing or distributing the flyers, along with any costs incurred in correcting the flyers to remove the express advocacy language. The Department will use this information to facilitate an informal resolution of Mr. Gillman's complaint.

⁵ Letter to Mr. Garth J. Christie, March 24, 2008, cited in your letter dated December 21, 2012.

Please be advised that if the Department is unable to resolve the matter through informal methods, the Department must refer the matter to the Attorney General for enforcement of the criminal penalty provided in MCL 169.257(3). MCL 169.215(10)(a).

Sincerely,

A handwritten signature in cursive script, appearing to read "Lori Bourbonais".

Lori Bourbonais

Bureau of Elections

Michigan Department of State

c: David A. Bieganowski